Supreme Court, U.S.
FILED
MAR 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-1477

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

E. W. COCHRAN ..... *Petitioner*

vs.

WAYLAND TAYLOR ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BY: WINSTON BRYANT
Attorney at Law
POST OFFICE BOX 38
NO. LITTLE ROCK, AR 72115
(501) 374-0225

Attorney for Petitioner

ARKANSAS LEGISLATIVE DIGEST, INC.

36 pp

QUESTION PRESENTED

WHETHER THE EIGHTH CIRCUIT VIOLATED THE PRINCIPLE OF CAUSATION AND VICARIOUS LIABILITY ENUNCIATED BY U.S. SUPREME COURT DECISIONS BY HOLDING THAT A MAYOR CAN BE LIABLE IN HIS INDIVIDUAL CAPACITY UNDER 42 U.S.C. §1983 FOR ACTIONS OF A CITY COUNCIL IN TERMINATING A CITY EMPLOYEE.

LIST OF PARTIES

THE PARTIES LISTED IN THE CAPTION TO THIS PROCEEDING WERE THE ONLY PARTIES REMAINING IN THE LAWSUIT WHEN IT WAS TRIED BEFORE THE DISTRICT COURT AND APPEALED TO THE EIGHTH CIRCUIT COURT OF APPEALS.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3-4

REASON FOR GRANTING THE WRIT 5-8

This court should grant certiorari because the Eighth Circuit's ruling overturning the judgment notwithstanding the verdict by the District Court conflicts with this Court's ruling in recent cases setting forth the principles of causation and vicarious liability in 42 U.S.C. Section 1983 cases.

CONCLUSION 9

APPENDIX A ..... A-1 to A-13
APPENDIX B B-1
APPENDIX C ..... C-1 to C-2
APPENDIX D ..... D-1 to D-3

TABLE OF AUTHORITIES

Page

CASES:

Monell vs. Dept. of Social Services, 436 U.S. 658 (1978) 6, 7

Mt. Healthy City School District Board of Education vs. Doyle, 429 U.S. 274 (1977) 4, 7

Rizzo vs. Goode, 423 U.S. 362 (1976) 6, 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. _____

E. W. COCHRAN ..... *Petitioner*

vs.

WAYLAND TAYLOR ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The above-captioned Petitioner hereby petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals, which is Appendix A attached to this Petition, was filed on October 5, 1987, and is reported at 830 F.2d 900 (8th Cir., 1987). The decision denying the Petition for a Rehearing and Petition for Rehearing En Banc is reprinted as Appendix B to this Petition. The Memorandum Opinion and Order of the United States District Court is unreported, and is reprinted as Appendix C to this Petition. It is case number J-C-85-7. Also included as Appendix D is the Order of Summary Judgment by the District Court which is unreported.

JURISDICTION

The judgment of the Court of Appeals was filed on October 5, 1987. Petitioner (Defendant below) petitioned the Court of Appeals for rehearing, and rehearing en banc, which petition was denied on December 10, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

42 U.S.C., Section 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

STATEMENT OF THE CASE

Respondent was hired by the City of Corning, Arkansas, on April 2, 1971, and was laid off on January 3, 1983. The Respondent worked as a Water Department employee. On January 1, 1983, Petitioner took office as the Mayor of the City of Corning. On January 3, 1983, the Corning City Council met in special session for the purpose of discussing the operations of the Water and Sewer Department. After discussing the operation of the Water Department, the Council voted unanimously to lay off the Respondent and another individual in the Water Department.

The Respondent was notified of his separation from the Water Department by his supervisor on January 3, 1983. Thereafter, on the same day, Respondent talked with Petitioner. The Respondent testified at the trial that Petitioner told him he was through because "you're Jess Pulliam's man" (Petitioner's opponent in the preceding election).

On January 17, 1985, Respondent filed suit against Petitioner, all members of the Corning City Council, and the City of Corning, Arkansas, under 42 U.S.C. §1983. Respondent alleged a violation of his procedural due process rights under the Fourteenth Amendment to the United States Constitution.

Prior to trial, Petitioner, along with the other Defendants, filed a Motion for Summary Judgment. The District Court granted the Motion for Summary Judgment in all respects except as to Petitioner in his individual capacity. See Appendix D. Petitioner was left in the lawsuit because the allegation by Respondent that he was fired because he was "Jess Pulliam's man" stated a First Amendment violation.

The case proceeded to trial and the jury found for the Respondent and returned a verdict in the amount of $33,000.00.

Subsequent to the jury's verdict, the District Court granted Petitioner's motion for a judgment notwithstanding the verdict. The District Court applied the test set forth in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), and found that the Respondent had met his burden under the *Mt. Healthy* decision, but that the Petitioner also met his burden by proving by a preponderance of the evidence that the Respondent would have been fired for other permissible reasons even in the absence of the protected conduct. See Appendix C-1 & 2.

On October 5, 1987, an Eighth Circuit panel reversed the judgment of the District Court and reinstated the jury's verdict (See Appendix A-1 to A-13). The majority panel held that the jury had reasonable grounds to conclude that the Petitioner would not have been fired but for his political affiliations (See Appendix A-7). Judge Henley concurred with the majority of the panel's decision affirming the District Court's granting of summary judgment. However, Judge Henley dissented, stating that he believed the District Court was right in granting the judgment notwithstanding the verdict because the evidence "was overwhelming, and went unrebutted," that Defendants had satisfied *Mt. Healthy*, supra. Additionally, Judge Henley stated that the District Court's decision should be affirmed for a further reason, not addressed by the majority of the panel, that the Respondent failed to show that the Constitutionally protected conduct was a motivating factor in his firing (See Appendix A-10). Judge Henley has hit upon the specific issue that should be addressed by this Court.

The Petitioner filed for a Rehearing and Rehearing En Banc which was denied by the Eighth Circuit on December 10, 1987 (See Appendix B).

REASON FOR GRANTING THE WRIT

THE EIGHTH CIRCUIT VIOLATED THE PRINCIPLES OF CAUSATION AND VICARIOUS LIABILITY ENUNCIATED BY U.S. SUPREME COURT DECISIONS BY HOLDING THAT A MAYOR CAN BE LIABLE IN HIS INDIVIDUAL CAPACITY UNDER SECTION 1983 FOR ACTIONS OF A CITY COUNCIL IN TERMINATING A CITY EMPLOYEE.

The decision of the Eighth Circuit in this case leads off with the following sentence: "In this case a jury found that the *City of Corning, Arkansas,* wrongfully fired Wayland Taylor for exercising his First Amendment rights, and awarded him damages." (emphasis added) The City of Corning was not a Defendant in the case before the District Court. The only Defendant in the case before the District Court was E. W. Cochran in his individual capacity. The order of the District Court granting Petitioner's Motion for Summary Judgment is quite clear.

The District Court states:

> Accordingly, the Plaintiff's due process claim must fail as to all Defendants, individually and officially. Defendants' Motion for Summary Judgment is granted insofar as the due process claim is concerned. (See Appendix D-1 & 2)

However, the Court at page 2 of its order further stated:

> Defendant Cochran does not contend, nor could he, that he would be entitled to a (sic) qualified immunity had he indeed laid off the Plaintiff on the basis of whom he supported or voted for in an election. Accordingly, Defendant Cochran's Motion for Summary Judgment in his individual capacity is denied. (See Appendix D-2)

There is no question but that E. W. Cochran was the only Defendant in the District Court, and he was a Defendant only in his individual capacity. Therefore, if the City of Corning fired the Respondent, there must be some causal connection between the City and Petitioner if the ruling of the Eighth Circuit is allowed to stand. As the Eighth Circuit dissent suggests, there is no causal connection. Petitioner did not lay off the Respondent. The Respondent was laid off by unanimous vote of the City Council. Petitioner did not vote on that decision (See Appendix A-10). Additionally, both members of the City Council that testified, did not disclose any Constitutional impermissible motivation for their actions (See Appendix A-10).

In *Rizzo v. Goode*, 423 U.S. 362 (1976), the United States Supreme Court held that personal involvement and a causal relationship are necessary to maintain a Section 1983 cause of action.

The *Rizzo* court stated at 423 U.S. 371:

> As the facts developed, there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners — express or otherwise — showing their authorization or disapproval of such misconduct. Instead, the sole causal connection found by the District Court between petitioners and the individual respondents was that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur, not with respect to them but as to the members of the classes they represented.

Likewise, the Supreme Court in *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978) stated:

> The italicized language (referring to the language of

> Section 1983) only imposes liability on a government that, under color of some official policy, "causes" an employee to violate another's constitutional rights. At the same time, that language cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor. Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B "caused" A to subject another to a tort suggests that Congress did not intend Section 1983 liability to attach where such causation was absent. (436 U.S. at 692)

Mt. Healthy School District Board of Education v. Doyle, supra, also held that causation is an essential element to impose liability on a Defendant.

The decision of the Eighth Circuit might logically follow if the Petitioner had been before the District Court in his official capacity as Mayor. Had that been the case, the action of the Council in laying off the Respondent would bind the City. Had the Petitioner been before the District Court in his official capacity, then the judgment of the jury in the District Court would be a judgment against the City. But, that is not the case. The Eighth Circuit decision allows the City Council, in terminating the Respondent, to vicariously impose liability against Petitioner in his individual capacity. If the principle of causation as enunciated in *Rizzo v. Goode*, supra, *Monell v. Dept. of Social Services*, supra, and *Mt. Healthy City School District Board of Education v. Doyle*, supra, means anything, then the Eighth Circuit decision is incorrect.

By reinstating the verdict against Petitioner, in his individual capacity, the Eighth Circuit has carved out an exception to the requirement of causation mandated by *Monell v. Dept. of Social Services*, supra, *Rizzo v. Goode*, supra, and *Mt. Healthy City School District Board of Education v. Doyle*, supra, and their progeny.

The Eighth Circuit has used the doctrine of *respondeat superior*, or its equivalent, to impose liability on a Mayor in his individual capacity. True, the City Council is not in a master/servant relationship with the Mayor in that both offices should be equal under the concept of separation of powers. However, the practical effect of the Eighth Circuit's decision would be the same as imposing liability on the Mayor for actions of a city employee. Such vicarious liability is expressly forbidden even had Petitioner been before the District Court in his official capacity. Here the Petitioner is actually one step removed from that situation because he was before the District Court in his individual capacity. Since Petitioner had no causal relationship to Respondent's termination, to impose liability on him is to do so vicariously.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

BY: WINSTON BRYANT
Attorney at Law
2ND AND WILLOW STREETS
POST OFFICE BOX 38
NO. LITTLE ROCK, AR 72115
(501) 374-0225

Attorney for Petitioner

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 86-2370

Wayland Taylor,	★	
	★	
Appellant,	★	Appeal from the United
	★	States District Court for
v.	★	the Eastern District of
	★	Arkansas.
E. W. Cochran, Mayor of the	★	
City of Corning and as an	★	
individual; Gene Kellett;	★	
Edwin Ahrent; Clarence	★	
Thomas; and Dorothy John-	★	
son, Members of The City	★	
Council of Corning, Arkansas;	★	
and The City of Corning,	★	
Arkansas,	★	
	★	
Appellees.	★	

Submitted: June 11, 1987

Filed: October 5, 1987

Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

MAGILL, Circuit Judge.

In this case a jury found that the City of Corning, Arkansas wrongfully fired Wayland Taylor for exercising his first amendment rights, and awarded him damages. The district court then granted defendant's motion for judgment

notwithstanding the verdict. We examine whether the district court was correct in granting defendant's motion. We conclude that the district court erred and accordingly, we reverse.

I. *FACTS.*

Appellant Wayland Taylor (Taylor) was hired by the City of Corning, Arkansas, on April 2, 1971. Taylor was originally hired as a mechanic and later was transferred to the Street Department, and then to the Water Department. When he was fired on January 3, 1983, Taylor was working in the Water Department.

On January 1, 1983, defendant E. W. Cochran (Cochran) took office as the mayor of Corning, Arkansas. Two days later, the Corning City Council met in special session to discuss the operations of the Water and Sewer Department. During this meeting, the Council voted to lay off Taylor and one other Water Department employee.

That same day, Taylor's supervisor told him of the layoff, then Taylor met and talked with Cochran. Taylor testified that Cochran told him he was through because "you're just Jess Pulliam's man" (Cochran's opponent in the preceding election). Cochran denied making such a statement.

Taylor was not given prior notice of the action to be taken against him and was not given a hearing either before or after being laid off.

II. *TRIAL COURT PROCEEDINGS.*

On January 7, 1985, Taylor filed suit under 42 U.S.C. §1983 against Cochran, all members of the Corning City Council and the City of Corning. Taylor alleged (1) that his procedural due process rights under the fourteenth amendment were violated because he had a property interest in

his position with the Water Department, (2) that he was entitled to a pretermination hearing, and (3) that he was entitled to a name-clearing hearing because of stigmatizing charges. Taylor sought both compensatory and punitive damages.

The defendants filed a pretrial motion for summary judgment, which the district court granted in part on September 16, 1986. The court held that Taylor did not have a property interest in his continued employment with the City of Corning, and thus his due process claim must fail as to all defendants. The court also concluded that the Council members were entitled to absolute immunity in their individual capacities because they were functioning in their legislative capacities. The court further held that in order to hold the City of Corning liable, Taylor must allege that a custom or policy existed of impermissible firing of employees on the basis of their political affiliations. Since no such policy was alleged in the complaint, the district court granted summary judgment to all the defendants in their official capacities. However, Cochran was left in the lawsuit because Taylor, although not alleging a first amendment violation in his complaint, filed an affidavit with his response to defendants' motion for summary judgment which alleged that he was laid off because he had supported Cochran's opponent in the previous election. The district court allowed the case to go to trial against Cochran because a material fact remained as to whether Cochran had told Taylor he was fired for being "Jess Pulliam's man" and also as to whether the reduction in personnel was merely a pretext for impermissible political retribution.

The case was tried before a jury on September 22, 1986, in the United States District Court, Eastern District of Arkansas, Jonesboro Division. The issues of fact were submitted to the jury by interrogatories. Interrogatory No. 1 asked: "Do you find from a preponderance of the evidence that Wayland

Taylor's exercise of his first amendment rights to freedom of association was a substantial or motivating factor in the decision to lay him off from his job with the water department of Corning, Arkansas?" To which the jury answered "yes." Interrogatory No. 2 asked: "Do you find from a preponderance of the evidence that Wayland Taylor would have been laid off from his job with the Corning water department even if he had not exercised his first amendment rights?" To which the jury answered "no." The jury returned a verdict for Taylor and awarded him damages of $33,000.

After the jury determination, Cochran filed a motion for directed verdict and/or motion for judgment notwithstanding the verdict (judgment n.o.v.). The district court granted the motion on October 14, 1986, holding that the "evidence of 'other reasons' for Taylor's 'layoff' was overwhelming, and went unrebutted • • •." This appeal followed.

III. *DISCUSSION.*

Taylor argues that the district court erred in granting Cochran's motion for judgment n.o.v. because there was substantial evidence to support the jury's finding of impermissible interference with Taylor's first amendment rights.[1] We thus examine the applicable standards.

---

[1]Taylor sets forth two other arguments: (1) that he had a property interest in his continued employment, and (2) that the district court failed to consider his affidavit alleging that his supervisors had advised him that he could not be fired or disciplined without cause. Both of these arguments address the district court's grant of summary judgment as to all the defendants but Cochran. In his brief, however, Taylor concedes that any property interest in continued employment with the City of Corning does not rest on an express contract. Moreover, Taylor does not claim that he was employed for a fixed term, or that there existed any express provision in a personnel manual or regulation prohibiting termination except for cause. This court's recent opinion in *Stow v. Cochran*, 819 F.2d 864 (8th Cir. 1987), is thus dispositive of Taylor's arguments. *Stow*, also an action

The standards for granting a motion for judgment n.o.v. are the same as those governing a directed verdict. *Tackett v. Kidder*, 616 F.2d 1050 (8th Cir. 1980). A directed verdict is normally employed when: (1) there is a complete absence of pleadings or proof on an issue or issues material to the cause of action; or (2) there are no controverted issues of fact upon which reasonable persons could differ. Thus, a verdict may properly be directed when, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict. But where there is sufficient evidence in conflict, so that reasonable persons could reach different conclusions, a directed verdict is improper. *Dace v. ACF Industries, Inc.*, 722 F.2d 374 (8th Cir. 1983).

Similarly, a motion for judgment n.o.v. may be granted only when, without weighing the credibility of the evidence or substituting the court's judgment for that of the jury, there can be but one reasonable conclusion as to proper judgment. Where there is sufficient conflicting evidence, or insufficient evidence to conclusively establish the movant's case, judgment n.o.v. should not be awarded. *Kort v. Western Surety Co.*, 705 F.2d 278 (8th Cir. 1983). In considering the motion, the court must view the evidence in the light and with all reasonable inferences most favorable to the party who secured the jury verdict. *Russell v. United Parcel Service, Inc.*, 666 F.2d 1188 (8th Cir. 1981).

---

against Mayor Cochran by an employee of the City of Corning, held that the city's employee handbook created no property rights under Arkansas law, and that any oral assurances of permanent employment were unauthorized and unenforceable. Although Arkansas case law has recently been slightly liberalized in favor of employees, *see, Gladden v. Arkansas Children's Hospital*, 728 S.W.2d 501, 505 (Ark. 1987), the City of Corning's employee handbooks would still be insufficient to create a property interest, because they do not expressly state that employees can be discharged only for enumerated causes. *See Drake v. Scott*, 823 F.2d 239 (8th Cir. 1987). Accordingly, we hold Taylor's arguments as to a property interest and binding oral assurances to be without merit.

Dace quotes the standard used in *Giordano v. Lee*, 434 F.2d 1227, 1231 (8th Cir. 1970), *cert. denied*, 403 U.S. 931, 91 S.Ct. 2250, 29 L.Ed. 2d 709 (1971), that:

> [A] motion for directed verdict is properly denied where the evidence presented allows reasonable men in a fair exercise of their judgment to draw different conclusions • • •. In making this determination, the evidence, together with all reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party.

Dace, 722 F.2d at 375.

In short, when a motion for directed verdict or for judgment n.o.v. is made, the court must assume that all of the evidence supporting the party opposing the motion is true, and must, in addition, give that party the benefit of all reasonable inferences drawn from the evidence. The case may be taken from the jury only if no rational jury could find against the moving party on the evidence so viewed. *Dace*, 722 F.2d at 376.

Based on these standards, we conclude that there was sufficient evidence to create an issue of fact for the jury regarding the true reason for Taylor's layoff, and thus the district court erred in granting judgment n.o.v. for Cochran.

The district court properly set out the applicable analytic framework governing Taylor's first amendment claim, as stated by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). Under this test, the burden was first placed on Taylor to show that his conduct was a substantial or motivating factor in the decision to lay him off. Taylor met this burden, for the jury, when asked in Interrogatory No. 1 whether Taylor's political activities had been a motivating factor in his being laid off, answered in the affirmative.

The burden then shifted to the defendant, Cochran, to prove by a preponderance of the evidence that Taylor would still have been fired, for other permissible reasons, even in the absence of the protected conduct. As to this step, the district court found as follows:

> The evidence of "other reasons" for Taylor's "layoff" was overwhelming, and went unrebutted: The division of the water department where Taylor worked was reduced from a five-person force to a three-person force; the City of Corning was experiencing a financial dilemma, requiring budget cuts; Taylor's position was left vacant after his layoff; Taylor and the other man laid off in the force reduction were the only two of the five employees who were not State certified to mix the chemicals used to treat the water; and Taylor could not become certified due to the fact that he cannot read and write well enough to pass a written test (a fact acknowledged by Taylor). Each of these facts presented by the defendant was either acknowledged or uncontested by the plaintiff.

Our review of the evidence, however, convinces us that the jury had reasonable grounds to conclude, as it did, that Taylor would not have been fired but for his political affiliations. We acknowledge that there was testimony, through Cochran and two councilmen, that Taylor's firing was economically motivated; however, other evidence failed to support that the Water Department was losing money, suggested that the city officials did not know the overall financial condition of the Water Department when the decision was made to lay off Taylor, or controverted Cochran's contention that the City's financial problems required budget cuts and layoffs.

First, the evidence reflecting the financial condition of the Water Department for the 1982 calendar year was not made available to Cochran and the two councilmen until January 10, 1983; one week after Taylor was laid off. Second, Cochran

testified that the Water Department finished the 1982 calendar year with some $41,742 in surplus funds. Third, during the March 1983 regular meeting, the City Council discussed reducing municipal water rates by $2.50.

Cochran contended that Taylor was the most logical choice for the layoff because he could not read or write and thus could not be certified by the Arkansas State Board of Health to operate the Water Department. However, the trial transcript reveals that witnesses were uncertain as to whether it was necessary for Taylor to be certified.

Finally, Cochran testified that he had discussed his concern over the financial problems of the Water Department with its department head, Floyd Pence, before the City Council meeting of January 3, 1983, and advised him of the action which would be taken. However, on further examination, Cochran admitted to being unsure whether he had spoken with Pence before or after the meeting.

Cochran points to other evidence which undermines Taylor's; for example, that although the City Council did not have the 1982 year-end financial report, monthly reports were available and showed financial losses, that the Council was considering reducing the water rates only in conjunction with an offsetting tax increase, and that certification was required for all Water Department employees.

We conclude, however, that these evidentiary conflicts were properly for the jury to decide. The evidence did not approach the complete level of one-sidedness necessary before judgment n.o.v. could properly be granted. "[F]or an order entering judgment notwithstanding the verdict to be proper, *all the evidence must point one way and be susceptible of no reasonable inferences sustaining the position of the non-moving party.*" *Gilkerson v. Toastmaster, Inc.*, 770 F.2d 133,

136 (8th Cir. 1985) (emphasis added). As the *Dace* court pointed out:

> This evidence supplies reasonable grounds for a jury to disbelieve the defendant's proffered reasons. * * * In short, the case was not clear enough to justify [a judgment n.o.v.]. If this case had been tried to the court, we would have had no difficulty in affirming, as not clearly erroneous, a finding for defendant supported by the opinion the District Court rendered here. But this case was not tried to the court. It should have been permitted to go to the trier of fact.

Dace, 722 F.2d at 379.

Accordingly, we reverse the judgment of the district court granting Cochran's motion for judgment n.o.v., and we reinstate the jury's verdict.

HENLEY, Senior Circuit Judge, concurring in part and dissenting in part.

I concur in footnote 1 of the panel's decision affirming the district court's granting of summary judgment. I dissent from the remainder of the panel's opinion which holds that the district court erred in granting defendant Cochran's motion for judgment notwithstanding the verdict.

The gravamen of this case is that Taylor claims he was laid off from his position in the Water Department of the City of Corning because the newly elected mayor, E. W. Cochran, believed that Taylor was "just Jess Pulliam's man" (Cochran's opponent in the mayoral election).

The allocation of the burden of proof in a case of this type is two-fold. "Initially . . . the burden . . . [is] upon [plaintiff] to show that his conduct was constitutionally protected, and that

this conduct was a 'substantial factor' — or to put it in other words, that it was a 'motivating factor' in the . . . decision [to fire him]." *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). If plaintiff carries that burden the defendant may still avoid liability if he can show by a preponderance of the evidence that the same decision would have been reached in the absence of the protected conduct. *Id.* In granting Cochran's motion for judgment n.o.v. the district court focused on Cochran's burden and concluded that the evidence that the same decision would have been made "was overwhelming, and went unrebutted." For reasons to be stated, I believe the district court's decision in this regard was correct. In addition, I believe that the district court's decision should be upheld on another ground argued by Cochran in his motion for judgment n.o.v. but not directly addressed by the district court — Taylor failed to show that constitutionally protected conduct was a motivating factor in his firing.

The evidence, read in the light most favorable to Taylor, does support the conclusion that Cochran harbored a constitutionally impermissible motivation. Cochran, however, did not lay off Taylor. Taylor was laid off upon unanimous vote of the city council. Cochran did not vote on that decision. The two councilmen who testified at trial (one of whom made the motion leading to Taylor's layoff) did not disclose any constitutionally impermissible motivation for their actions.

In *McGee v. South Pemiscot School District R-V*, 712 F.2d 339 (8th Cir. 1983), we held that where a school board's decision to discharge a teacher turned on a single vote and the teacher met his *Mt. Healthy* burden of demonstrating impermissible motivation on the part of one board member who voted against him, he is entitled to relief. In the present case the only connection Taylor has shown between the adverse employment decision and Cochran's impermissible motivation is that Cochran called the city council meeting. Taylor has not shown impermissible motivation by any of the

councilmen who made the decision to lay him off. In *McGee*, I was "unwilling to assume that a factor that motivates a single board member motivates the board to such an extent as to" sustain plaintiff's burden of proof under *Mt. Healthy*. *McGee*, 712 F.2d at 345 (Henley, Senior Circuit Judge, dissenting).

Thus, in this case I am even less willing to assume that Cochran's improper motivation which may have led to calling the council meeting should be imparted to the councilmen who ultimately made the decision to lay off Taylor. Cochran's disposition toward Taylor simply cannot, without more, be translated into the motivating factor of the council's decision. *Mt. Healthy* makes plain that it is the decision-maker's motivation that is to be plumbed, *Mt. Healthy*, 429 U.S. at 287; *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 (1977), not that of persons peripheral to the decision-making process. Accordingly, I would hold that Taylor failed to sustain his initial burden of proof and affirm the district court's granting of judgment n.o.v.

I also believe that the district court correctly granted judgment n.o.v. in Cochran's favor because his evidence that the council would have reached the same decision in the absence of improper motivation went unrebutted. Cochran presented evidence that the decision to lay off two Water Department employees was for financial reasons. The panel's argument that the jury could have found the financial explanation to be pretextual is unpersuasive. First, the panel contends that the financial condition of the Water Department was not made known to the city council until one week after Taylor was laid off. This is incorrect. Although the final yearly report did not become available until that time, the councilmen received monthly fiscal reports. The councilmen knew by looking at these monthly reports in October and November when they prepare the following year's budget that the Water Department was experiencing financial difficulty. Thus, even

though the decision to lay off Taylor was taken before the final year end financial statement was prepared, it is unrebutted that the councilmen were well aware of the Water Department's financial condition.

The panel next contends that the financial motivation was pretextual because the city ended the year with surplus funds. This is true. A municipality, however, does not have the luxury of deficit spending as does the federal government. In addition, the Water Department needed to maintain a surplus account to cover major equipment breakdown. In fact, the yearly statements prior to Taylor's layoff show that the Water Department's surplus was shrinking — they were losing money.

Finally, the panel points to the fact that the city council was considering reducing the municipal water rates as evidencing a lack of financial hardship. This reduction, however, would only go into effect if the voters approved an increase of one cent in the city sales tax. When the sales tax measure failed at the polls, no further consideration was given to reducing water rates. Thus, the city council was only interested in restructuring the way Water Department revenues were raised, not reducing them.

The evidence that the Water Department was losing money was not illusory and was unrebutted. The evidentiary conflicts the panel finds are not true conflicts, but are the jury's disregard of the unrebutted evidence.

Finally, Cochran claims that Taylor was singled out to be laid off because he was not state certified to add the chemicals to treat the city's water. Because Taylor can neither read nor write, it was unlikely that he could pass the written certification test. Although there may be some doubt as to whether it was necessary for Taylor to become certified, it does

not follow that either lack of certification or illiteracy was an invalid criterion for the council to apply, particularly when the potability of the city's drinking water was concerned.

From the reversal of the judgment granting Cochran's motion for judgment n.o.v., I respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 86-2370

Wayland Taylor,	★	
	★	
Appellant,	★	
	★	Appeal from the United
	★	States District Court for
v.	★	the Eastern District of
	★	Arkansas.
E. W. Cochran, etc., et al.,	★	
	★	
Appellees.	★	

Petition for rehearing en banc filed by appellee E. W. Cochran has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

December 10, 1987

Order Entered at the Direction of the Court:

/s/ Clerk, United States Court of Appeals, Eighth Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
Jonesboro Division

WAYLAND TAYLOR ..... *Plaintiff*

V. No. J-C-85-7

E. W. COCHRAN, Mayor of the
City of Corning ..... *Defendant*

ORDER

Pending before the Court is defendant's motion for judgment n.o.v. The Court had reversed ruling on the defendant's motion for directed verdict made at the close of the plaintiff's case. The defendant's motion is meritorious and is hereby granted.

Plaintiff Taylor alleged and testified at trial that Mayor Cochran had told him that the reason Taylor was "laid off" from his job at the water department was Taylor had supported Mayor Cochran's opponent in the previous election. Mayor Cochran denied that any such conversation had taken place. However, the jury, when asked on Interrogatory whether Taylor's political activities had been a motivating factor in his being "laid off," answered in the affirmative.

Assuming then that the conversation did take place, the burden shifted to the defendant, Cochran, to prove by a preponderance of the evidence that Taylor would have been laid off for other permissible reasons. Of course, at that juncture, Taylor had the opportunity to show that the "other reasons" were pretextual. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977).

The evidence of "other reasons" for Taylor's "layoff" was overwhelming, and went unrebutted: The division of the water department where Taylor worked was reduced from a five-person force to a three-person force; the City of Corning was experiencing a financial dilemma, requiring budget cuts; Taylor's position was left vacant after his layoff; Taylor and the other man laid off in the force reduction were the only two of the five employees who were not State certified to mix the chemicals used to treat the water; and Taylor could not become certified due to the fact that he cannot read and write well enough to pass a written test (a fact acknowledged by Taylor).

Each of these facts presented by the defendant was either acknowledged or uncontested by the plaintiff. The jury verdict for the plaintiff simply cannot stand when the *Mt. Healthy* test is applied to the evidence adduced at trial.

Accordingly, the defendant's motion is granted.

/s/ Henry Woods
U. S. District Judge
10/14/86

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
Jonesboro Division

WAYLAND TAYLOR ..... *Plaintiff*

V. No. J-C-85-7

E. W. COCHRAN, Mayor of the
City of Corning, et al ..... *Defendants*

ORDER

Pending before the Court is Defendants' Motion for Summary Judgment. After a careful review of the pleadings and supporting documents, the Court is convinced that the plaintiff had no property interest cognizable under the fourteenth amendment to the United States Constitution in continued employment with the City of Corning, Arkansas. Such an interest must be grounded in an independent source such as state law or an employment contract, either express or implied. *Board of Regents v. Roth*, 408 U.S. 577 (1972).

Plaintiff has directed the Court to no state law creating a property interest in employment in a case such as this. There was apparently no written contract and the Court can find no substantial evidence of an implied contract. The "Personnel Policies and Employee Handbook," in fact, clearly indicates, on Page Two, that it creates no contractual rights in the employee.

Accordingly, the plaintiff's due process claim must fail as to all defendants, individually and officially. Defendants' motion for summary judgment is granted insofar as the due process claim is concerned.

However, the plaintiff has also stated, somewhat inartfully, a claim based on the first amendment, as applied to the state through the fourteenth amendment. The plaintiff alleges Mayor E. W. Cochran told him that the reason for his being "laid off" was that the plaintiff had supported Mayor Cochran's opponent in the previous election. This allegation is supported by the plaintiff's affidavit appended to his Response to the Motion for Summary Judgment. While the defendants have produced evidence that the plaintiff was laid off for economic reasons, a genuine issue of material fact remains as to whether Mayor Cochran and the plaintiff had the conversation as alleged, and further, whether the force reduction was merely a pretext for what was in fact impermissible political retribution. If the plaintiff were penalized for exercising his first amendment right of association, then his property interest, or lack of it, in continued employment is irrelevant. Neither the defendants' motion for summary judgment, nor the accompanying brief addresses the issue of the allegation of impermissible interference with the plaintiff's first amendment rights.

Defendant Cochran does not contend, nor could he, that he would be entitled to a qualified immunity, had he indeed laid off the plaintiff on the basis of whom he supported or voted for in an election. Accordingly, defendant Cochran's motion for summary judgment in his individual capacity is denied.

A suit against a municipal officer in his or her official capacity is tantamount to a suit against the governmental entity itself. *Brandon v. Holt*, 469 U.S. 464 (1985). In order to hold the City of Corning liable, the plaintiff must allege that the city had a custom or policy of impermissibly firing or laying off employees on the basis of their political affiliations. No such policy is alleged. Accordingly, summary judgment is granted to all defendants in their official capacities.

Council members in their individual capacities are entitled to absolute immunity when functioning in their legislative capacities. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980). Clearly the council members in this case were functioning in their legislative capacities when they voted to reduce the force in the water department, which led to the plaintiff's "lay off." Accordingly, Gene Kellett, Edwin Ahrent, Clarence Thomas and Dorothy Johnson are hereby granted summary judgment in their individual capacities.

This 15th day of September, 1986.

/s/ Henry Woods
U. S. District Judge